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In the

Supreme Court of the United States

October Term, 1962

FRED DUNLAP AND JAMES BARBOUR,
Appellants,

vs.

THE STATE OF OHIO,
Appellee.

On Appeal From The Supreme Court
of The State of Ohio.

JURISDICTIONAL STATEMENT

MELVIN SCHAENGOLD
500-502 Keith Building
Cincinnati 2, Ohio
Attorney for Appellants

Of Counsel:
EUGENE D. SMITH, Esq.
Attorney at Law
18 East Fourth Street
Cincinnati 2, Ohio

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vs.

THE STATE OF OHIO,
Appellee.

On Appeal From The Supreme Court of The State of Ohio.

JURISDICTIONAL STATEMENT

The Appellants, Fred Dunlap and James Barbour appeal from the final judgment of the Supreme Court of the State of Ohio. The appeal presents the question whether their conviction for violation of 3719.15 of the Ohio Revised Code, dealing with control of so-called "exempted drugs" was consistent not only with the principles of due process as guaranteed in the Fourteenth Amendment to the Constitution as well as with the Constitutional Ban against cruel and unusual punishments as forbidden by the Eighth Amendment to the Constitution.

OPINIONS BELOW

There were no written opinions below construing the state statute under which these Appellants were convicted. Appellants were convicted in the Court of Common Pleas of Hamilton County, Ohio, and appealed their convictions to the Court of Appeals for the First Appellate District of Ohio. Without opinion, the Court of Appeals affirmed their convictions. The Supreme Court of Ohio dismissed the subsequent Appeal to it for the reason that no debateable constitutional question was involved. (APPENDIX "A")

Since there are no opinions of the Ohio Courts construing the statute under which the Appellants were convicted this Court is free to construe and to apply that statute as it sees fit. *Terminiello* v. *Chicago*, 337 US 1, 4.

JURISDICTION

The Appellants were indicted and convicted for violation of Section 3719.16 of the Ohio Revised Code. (APPENDIX "B") To sustain a conviction, Paragraph two (2) of Section 3719.16 must be held valid. At the trial in the Court of Common Pleas of Hamilton County, Ohio, and in the Court of Appeals for the First Appellate District of Ohio, and in the Supreme Court of Ohio, Appellants contended that Paragraph two (2) of Section 3719.16 ORC was unconstitutional; that contention was resolved without opinion construing Paragraph two (2) of Section 3719.16 ORC by all of the courts in the State of Ohio that passed on the question. (APPENDIX "E")

The Ohio Supreme Court dismissed Appellants' appeal on February 13, 1963; an Application for Rehearing was timely filed in the Ohio Supreme Court and was denied on March 13, 1963. On May 27, 1963, Notice of Appeal

to the Supreme Court of the United States was filed in the Supreme Court of Ohio.

Originally, the Appellants were tried separately before different judges in the Court of Common Pleas of Hamilton County, Ohio. When their cases reached the Supreme Court of Ohio, they were heard and argued together in that court. To make an appeal less cumbersome for all parties concerned, both Appellants and Appellees, and since the same and identical question was involved, namely the constitutionality of Paragraph two (2) of Section 3719.16 ORC, Mr. Chief Justice Taft, of the Supreme Court of Ohio, on motion of the Appellants, on April 9, 1963, consolidated the two cases into one case for the purposes of taking an appeal in both cases to the Supreme Court of the United States.

There can be no question but that the jurisdiction of this Court to hear this appeal is properly invoked under 28 USC Sec. 1257 (2), since the constitutionality of a state statute under federal law is involved and the appeal is brought by a person against whom the constitutionality of the statute was sustained. Should this Court determine that the denial of federal constitutional rights presented here are not the proper subject matter of an appeal, they should be considered as if contained in a petition for a Writ of Certiorari. 28 USC Sec. 2103.

QUESTIONS PRESENTED

I. Whether Paragraph two (2) of Section 3719.16 ORC, as applied in these cases, violated the due process of law clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment,

(a) because the statute involved, Paragraph two (2) of Section 3719.16 ORC is so vague and indefinite that

it failed to provide notice to Appellants that their conduct was proscribed by the penal provisions of the statute;

(b) because, as applied here, a cruel and unusual punishment was inflicted on the Appellants by virtue of the penal provisions of the statute (i.e., Paragraph two (2) of Section 3719.16 ORC).

THE STATUTE INVOLVED

The statute involved, and the federal constitutionality of which is questioned by the Appellants, is Paragraph two (2) of Section 3719.16 of the Ohio Revised Code. To interpret Section 3719.16 of the Ohio Revised Code it is also necessary to consider Section 3719.15 of the Ohio Revised Code. (APPENDIX "B")

STATEMENT OF THE CASE

Waiving his right to a trial by jury, the Appellant, Fred Dunlap, was, on June 5, 1961, tried before the Honorable Charles E. Weber, a duly elected, acting and qualified judge of the Court of Common Pleas of Hamilton County, Ohio. The Appellant was tried on an indictment charging a violation of Section 3719.16 ORC. The section is set forth in Appendix "B" along with Section 3719.15 ORC and is duly certified as being a part of the record in the case before the Supreme Court of Ohio.

Appellant, Dunlap, demurred to the indictment on the grounds that the provisions of Paragraph two (2) of Section 3719.16 ORC was unconstitutional. Said demurrer was duly overruled by the Court of Common Pleas of Hamilton County, Ohio. Whereupon, Appellant, Dunlap, entered a plea of Not Guilty and a complete transcript of the testimony of his trial is also a part of the record before the Supreme Court of Ohio.

At all appropriate stages in the trial, counsel for the Appellant, Dunlap, raised his objection to the constitutionality of Paragraph two (2) of Section 3719.16 ORC. The constitutionality of the section was upheld by the Ohio Courts at all times.

During Dunlap's trial, the testimony presented by the Appellee, namely, a state narcotic agent, a chemist and several trained registered pharmacists, (APPENDIX "C") showed that only a person of highly specialized training, to wit: pharmacist or chemist, could understand the technical language of Section 3719.15, the controlling section referred to in Section 3719.16 of the Ohio Revised Code.

The Appellee called several such highly trained specialized individuals to sustain their position that "paregoric" the subject matter of the indictment, was included in the prohibitions of Section 3719.16 ORC. Pertinent portions of this testimony are set forth in Appendix "C". The statute, itself, does not prohibit "paregoric" by such name.

Even a cursory reading of the testimony shows that only a trained chemist or a registered pharmacist, physician or such trained person could understand the statute under which Appellant was prosecuted. The statute as it now reads is aimed at laymen as well as the highly trained individuals. A study of the history of the Sections 3719.15 and 3719.16 ORC disclosed that they were first enacted in 1953 as a part of the Revised Narcotic Control Act. In 1953, when the legislature enacted the two sections, paragraph "b" was not in Section 3719.16 ORC. The statutes at this time were directed towards physicians, dentists, veterinarians, apothecaries or pharmacists. The section then, as now, permitted certain medicinal preparations containing small amounts of narcotic drugs to be sold across the counter in everyday commerce.

In 1959, the legislature amended Section 3719.16 ORC by the addition of Paragraph two (2). The section herein-

before limited to a class of persons with special knowledge and skill and professional capacity was by legislative enactment made to include the everyday ordinary citizen without such specialized or professional skill. The statute was no longer aimed properly at chemists, registered pharmacists, doctors, dentists, veterinarians and so forth, but has now imposed an unreasonable, arbitrary, oppressive and discriminatory burden upon an ordinary citizen to know a science limited only to a special class of citizens hereinbefore set out. Absolutely no provisions were made by the addition of Paragraph two (2) to Section 3719.16 ORC to inform the non-professional citizen, in language he could understand, the prohibition contained in that section. Surely, it is a cruel and unusual punishment to confine a citizen such as this Appellant in the penitentiary for a period of from 2-5 years merely because he lacks the training that is peculiar to a chemist, doctor or pharmacist and therefore is unable to interpret the provisions of the section as applied to ordinary, everyday medicinal preparations sold across the counter by a common name such as "paregoric".

At the conclusion of his trial, the Appellant, Dunlap, was found guilty and was sentenced to be confined in the Ohio Penitentiary for a period of from 2-5 years.

The Appellant, James Barbour, was likewise tried on October 17, 1961, before the Honorable Ralph B. Kohnen, a duly elected, acting and qualified judge of the Court of Common Pleas of Hamilton County, Ohio. Barbour, like Dunlap set out above, was tried on the same charge as Dunlap, and like Dunlap, raised the same issues at his trial and, like Dunlap, Barbour was also convicted and sentenced to serve 2-5 years in the Ohio Penitentiary.

Both of these cases were argued at the same time in the Supreme Court of Ohio and that court sustained the constitutionality of the statute, Paragraph two (2) of Section 3719.16 ORC, and upheld the sentence of the Appellants

without opinion. Since the cases were argued and determined at the same time in the Supreme Court of Ohio, Mr. Chief Justice Taft of that court consolidated both of the cases for the purposes of appeal to this Court.

The most striking and most singular feature of the trials of these Appellants in the Court of Common Pleas of Hamilton County, Ohio, is that Appellants purchased a commonly known commercial product, "paregoric", which, it now appears, falls within the prohibitions of Section 3719.16 of the Ohio Revised Code by reason of its chemical formula. However, the state did not contend that the Appellants had sufficient knowledge or training to know the composition of "paregoric" or the skill and training necessary to do the conversions from the metric systems to apothacary systems to everyday understanding of measurements in order to determine whether or not they were violating the law. To so charge an untrained individual is comparable with the assumption that a person must know a book is obscene without first having read it. States can not follow such procedure where books are concerned. *Smith* v. *California*, 361 US 147. The same rule should apply also in such a case as this where the citizen can not know without first "reading" and converting that he is violating the law.

THE QUESTIONS ARE SUBSTANTIAL

While the power of a state to regulate the use of narcotics within its borders is extremely broad, *Whipple* v. *Martinson*, 256 US 41, that power is not infinite. *Robinson* v. *California*, 370 US 660. The state can not use its Police Power to regulate the use of narcotics in such a fashion and manner that the exercise of that power resulted in cruel and unusual punishments. *Robinson* v. *California*, 370 US 660. The *Robinson* case is a land

mark case because it is the only case ever decided by this Court, to date, in which a state statute, regulating narcotics was ever struck down as being unconstitutional by this Court. Following the salutary example of the *Robinson* case, this Court should strike down Paragraph two (2) of Section 3719.16 for the reason that caused the Court to strike down the California statute in the *Robinson* case.

No one, of ordinary intelligence, who reads Section 3719.16 Paragraph two (2) of the Revised Code of Ohio along with Section 3719.15 of the Ohio Revised Code could tell what that section prohibits; the only persons who could understand that section would be physicians, chemists, pharmacists, dentists and such other trained persons. Paragraph "B" is aimed at laymen. It is aimed at people who do not have specialized training in chemistry and who can not be expected to have such specialized knowledge. The trend today is to call drugs by their popular names, that is to call them by their everyday known names such as paregoric, cosanyl, etc. To incase the prohibitions of use of drugs in such technical mumbo-jumbo as the State of Ohio has used in this statute is as passe as segregation in the public schools. (See: APPENDIX "D")

It is axiomatic that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally* v. *General Construction Company*, 269 US 385; *Lanzett* v. *New Jersey*, 306 US 451; *Cline* v. *Frink Dairy Co.*, 274 US 445; *United States* v. *Cohan Grocery Co.*, 255 US 81.

We are not asking this Court to evaluate this case in the abstract; we are asking this Court to evaluate this case in concrete reality. In concrete reality, no one, save a person of specialized knowledge and skill, could know what the statute under which these Appellants were tried, convicted and sentenced to from 2-5 years in the Ohio Peniten-

tiary could mean. *United States* v. *National Dairy Corp.*, No. 18, October term, 1962 (February 18, 1963) (slip opinion p. 4).

Furthermore, and this is most cogent, the statute involved here, under which these Appellants were convicted, does not require a criminal intent, guilty knowledge or the traditional *mens rea*. Proof of such an intent might have avoided the constitutional charge of vagueness, for, as has been stated "the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which otherwise may render a vague or indefinite statute invalid". *Screws* v. *United States*, 325 US 91, 101 (plurality opinion), e.g., *United States* v. *National Dairy Corp.*, *supra* at 6-7; *Omaecheverraria* v. *Idaho*, 246 US 343, 348 (1918); *Hygrade Provision Co.* v. *Sherman*, 266 US 497, 502 (1925); cf., *Smith* v. *California*, 361 US 147 (1959).

The best that can be said for the statute that the State of Ohio relies on to jail these Appellants is that, for practical purposes, it was not only written in a language foreign to the community but also in print too fine to read. *Lambert* v. *California*, 225, 228 (1957).

It would have been extremely simple for the State of Ohio to have accomplished its purpose, namely, of regulating the use of certain harmless medicinal preparations by naming the medicinal preparations that the state sought to regulate by their popular name. If the state wanted to regulate "paregoric", for example, it should have said so; but it didn't; and that is the vice of the statute. The formula set up by the statute to regulate a rule of conduct is so technical and so complex that no person of ordinary intelligence could possibly know what the statute means. (See Testimony of Jack Braunstein, State Narcotic Agent for the State of Ohio and Mr. Charles Riley, Chemist for Alcohol & Tobacco Tax Laboratory, United States Treas-

ury Department, Cincinnati area, Appendix "C".) The voiding of the second paragraph of Section 3719.16 in its present form, will not make Ohio a haven for the traffic of narcotics. Voiding paragraph B will leave the state in the same position its placed itself in the original enactment of the act and prior to the hastedly added amendment of 1959. Should the state wish to regulate the purchaser, as well as the seller, the state should pass a law that the purchaser could understand. From the testimony found in Appendix "C", it appears that even some of the sellers do not understand the law.

CONCLUSION

In a once in a lifetime way this case presents the void for vagueness question in reverse; that statute sets forth such a technical standard that it is vague because only the technically trained can understand it; and the statute was not, through the provisions of the second paragraph, aimed at the technically trained. The second paragraph of Section 3719.16 was aimed at the person of ordinary intelligence. This being so, the conviction and sentencings of the Appellants to imprisonment in the Ohio Penitentiary for a period of from 2-5 years not only violates the due process clause of the 14th Amendment; it also is a cruel and unusual punishment.

For the foregoing reasons, probable jurisdiction should be noted.

All of which is respectfully submitted by,

MELVIN SCHAENGOLD
500-502 Keith Building
Cincinnati 2, Ohio
Attorney for Appellants

Of Counsel:
EUGENE D. SMITH, Esq.
Attorney at Law
18 East Fourth Street
Cincinnati 2, Ohio

APPENDIX "A"

In the
SUPREME COURT OF THE STATE OF OHIO

Nos. 37689 and 37690

STATE OF OHIO,
Plaintiff-Appellee,

vs.

FRED DUNLAP,
Defendant-Appellant.

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES BARBOUR,
Defendant-Appellant.

JOURNAL ENTRY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no debatable constitutional questions exist herein.

It is further ordered that the plaintiff-appellee recover from the defendant-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry

this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

. . . . . .

APPENDIX "B"

OHIO REVISED CODE

§ 3719.15 Exceptions.

Except as specifically provided in sections 3719.01 to 3719.22, inclusive, of the Revised Code, such sections shall not apply to the following cases:

(A) Where a physician, dentist, or veterinarian administers or dispenses; or where an apothecary sells at retail any medicinal preparation that contains in one fluid ounce, or if a solid or semisolid preparation, in one avoirdupois ounce:

(1) Not more than two grains of opium;

(2) Not more than one quarter of a grain of morphine or of any of its salts;

(3) Not more than one grain of codeine or of any of its salts;

(4) Not more than one eighth of a grain of heroin or any of its salts;

(5) Not more than one half of a grain of extract of cannabis nor more than one half of a grain of any more potent derivative or preparation of cannabis;

(B) Where a physician, dentist, or veterinarian administers or dispenses; or where an apothecary sells at retail liniments, ointments, and other preparations, that are susceptible of external use only and that contain narcotic drugs in such combination as prevent their being readily extracted

from such liniments, ointments, or preparations, except that such sections shall apply to all liniments, ointments, and other preparations, that contain coca leaves in any quantity or combination.

(DULY CERTIFIED.)

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§ 3719.16 Conditions.

The exemptions authorized by section 3719.15 of the Revised Code are subject to the following conditions:

(A) No person shall prescribe, administer, dispense, or sell, under the exemptions of such section, to any one person, or for the use of any one person or animal, any preparation included within such section, when he knows, or can by reasonable diligence ascertain, that such prescribing, administering, dispensing, or selling will provide the person to whom or for whose use, or the owner of the animal for the use of which, such preparation is prescribed, administered, dispensed, or sold, within any forty-eight consecutive hours, with more than four grains of opium, or more than one half of a grain of morphine or [of] any of its salts, or more than two grains of codeine or of any of its salts, or more than one quarter of a grain of heroin or of any of its salts, or will provide such person or the owner of such animal, within forty-eight consecutive hours, with more than one preparation exempted by such section from the operation of sections 3719.01 to 3719.22, inclusive, of the Revised Code.

(B) The medicinal preparation, or the liniment, ointment, or other preparation susceptible of external use only, prescribed, administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone. Such preparation shall be prescribed, administered, compounded, dis-

pensed, and sold in good faith as a medicine, and not for the purpose of evading such sections.

Neither this section nor section 3719.15 of the Revised Code shall limit the kind and quantity of any narcotic drug that may be prescribed, administered, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, compounded, dispensed, or sold, in compliance with sections 3719.01 to 3719.22, inclusive, of the Revised Code.

(DULY CERTIFIED.)

§ 3719.16 Sale of exempted drugs. (Eff 10-22-59)

"No person shall dispense or sell, under the exemptions of Section 3719.15 of the Revised Code to any one person, or for the use of any one person or animal, any preparation included within such section, when he knows, or can by reasonable diligence ascertain that such dispensing or selling will provide the person to whom or for whose use, or the owner of the animal for the use of which, such preparation is dispensed or sold, within any forty-eight consecutive hours, with more than two grains of opium, or more than one-half of a grain of morphine or any of its salts, or more than four grains of codeine or of any of its salts, or more than two grains of dihydrocodeine or any of its salts, or more than one-half grain of ethylmorphine or any of its salts, or will provide such person or the owner of such animal, within forty-eight consecutive hours, with more than one preparation exempted by the provisions of section 3719.15 of the Revised Code.

"No person shall obtain or attempt to obtain, under the exemptions of section 3719.15 of the Revised Code, more than one preparation exempted by the provisions of that section within forty-eight consecutive hours."

(DULY CERTIFIED.)

APPENDIX "C"

References to pages in parenthesis are references to pages in the original record when this testimony was given at the trial.

From Dunlap's Case:
Direct & Cross Examination of Charles Riley.
Cross-Examination of Jack Braunstein.
Cross-Examination of Samuel Dollin.
Cross-Examination of Samuel Berg.
Cross-Examination of Isadore Fleischman.
Cross-Examination of Edward E. Tessel.
Cross-Examination of Henry T. Kail.
Cross-Examination of Ben Torf.
Objection made by Mr. Smith to the Court.
Direct Examination of Fred Dunlap.
From Barbour's Case:
Cross-Examination of Henry T. Kail.
Direct Examination of James Barbour.

EXCERPTS FROM TRANSCRIPT OF RECORD

• • •

(47) **Charles Riley**

• • •

DIRECT EXAMINATION

By Mr. Mathews:

Q Will you state your name, sir?

A Charles Riley.

Q And where do you live, Mr. Riley?

A I live in Erlanger, Kentucky.

Q What is your occupation, Mr. Riley?

A Chief Chemist of the Alcohol & Tobaceo Tax Laboratory, United States Treasury Department, Cincinnati area.

Q Mr. Riley, what education have you had and experience in chemistry?

MR. SMITH: We will stipulate his qualifications, your Honor. He is the government's chief chemist. We have heard his qualifications?

THE COURT: He is the chief chemist for whom?

MR. MATHEWS: Alcohol Tax Unit of the Treasury De- (48) partment. Is that right, Mr. Riley?

THE WITNESS: Yes, sir.

Q Mr. Riley, Mr. Smith here has been good enough to stipulate your qualifications as an expert in chemistry. I wonder if you will tell Judge Weber, first of all, what is the chemical — well, let's go back a little bit. In the preparation of pharmaceutical formulas, pharmaceutical products, is there a standard for formulas?

A Well, many pharmaceutical products have become standardized and a standard formula established, either in the U. S. Pharmacopoeia or National Pharmacopoeia, on which there are two official books.

Q They are recognized in the industry?

A Yes, sir, recognized in the industry and recognized by the Food & Drug Administration.

Q Now, is paregoric one of the preparations which would be covered by a standard formula?

A Yes, sir.

Q I wonder if you will tell Judge Weber what the chemical contents of paregoric is?

A Well, the composition of paregoric, U.S.P. or as listed in the U. S. Pharmacopoeia, is a mixture of several ingredients. Each thousand parts of the preparation contain 40 parts of tincture of opium, four parts of oil of anise, four parts of benzoic acid and four parts of camphor. Now, this one (49) thousand parts of the total mixture is in an alcohol solution, which contains from 44 to 46 per cent of ethyl alcohol.

Q So, in other words, if you made a thousand ounces of paregoric, you would have 40 ounces of tincture of opium in there; is that correct?

A Forty fluid ounces.

Q Forty fluid ounces?

A Yes, sir.

Q Now, can you convert that — so then, in one ounce of paregoric, you would have four-hundredths of an ounce of tincture of opium; is that correct?

A Yes.

Q Now, can you convert that four-hundredths of an ounce figure to grains?

A Well — of opium?

Q Yes, grains of opium. Well, actually, in the process doesn't the opium become morphine?

A Well, the morphine is one of the alkaloids in opium. In fact, it is the principal alkaloid in opium, and when tincture of opium is prepared, and paregoric is prepared, it is prepared on the basis of a certain morphine content in the tincture of opium, and it is usually figured on the morphine content.

Q Now, based on the formula that you have given, what is the morphine content of — however you want to do it — a thousand parts?

(50) A Of paregoric?

Q Of paregoric, yes.

A Well, the morphine content of paregoric, in grains per fluid ounce, there is a maximum and a minimum figure. It contains from .160 to .205 grains per fluid ounce of anhydrous morphine in the paregoric.

Q And, of course, one-quarter grain would be .25?

A .25, yes, sir.

MR. MATHEWS: You may cross examine.

CROSS EXAMINATION

By Mr. Smith:

Q I just want to clear up a few things so we have it straight, so when we come to the argument to the Court. When you say one thousand part, you can say one thousand gallons; is that right?

A You could.

Q To keep it simple, because they make it up in thousand-gallon or 500-gallon lots; is that right?

A Yes, sir.

Q So in the one thousand gallons of paregoric, you would have 40 parts, or 40 gallons of tincture of opium, right?

A Yes, sir, that's right.

Q Forty gallons of tincture of opium. You would have four gallons of anise, oil of anise?

A Right.

(51) Q You would also have four gallons of benzoic acid, right?

A Well, that would be on the basis of weight, rather than volume, but it would be equivalent.

Q Four gallons?

A Well, it would be in grams. It would be four times, about 3785 grams, but approximately that.

Q Well, would it be all right to say four gallons, approximately?

A Well, it is four parts in relation to the thousand parts.

Q All right, four parts of benzoic acid?

A Yes, sir.

Q And then you would have four parts of camphor, right?

A Yes, sir, by weight.

Q And then you "Q.S." that by a thousand gallons by adding alcohol?

MR. MATHEWS: What is "Q.S.?"

THE WITNESS: Quantity sufficient to make.

Q Would make a thousand gallons?

A Yes. You would use an alcohol-water mixture.

Q Of alcohol and water?

A Which gave you a thousand gallons of alcoholic mixture with 44 to 46 per cent alcohol.

Q Now, the opium dissolves in the solution when it is (52) being mixed up and then becomes morphine?

A No, sir. The morphine is one of the soluble substances in the tincture of opium and remains as a soluble substance in the completed paregoric.

Q But the other part of the opium is of no value as far as the product, end product, is concerned?

A Well, it is of value, because there are other alkaloids in the opium in addition to the morphine, but the morphine is the principal one.

Q So when this is finished up as a thousand gallons of paregoric now, then the formula doesn't read opium, it reads morphine, right, in so far as the regulations are concerned?

A Well, it can be expressed either in terms of a quantity of granular opium or in a quantity of morphine, because the opium used contains ten per cent morphine, so the quantity of opium is ten times the morphine content.

Q That varies, though, does it not?

A It varies slightly. The U.S.P. gives a range on the opium from .95 to .105 per cent in the tincture of opium, so it is very little range.

Q So then your morphine also varies in content from .160 to .205, right?

A Yes, sir. That is the maximum and minimum. Of course, if it is made up exactly, it would be at the intermediate point in morphine content.

(53) Q Now, depending upon where you got your opium, and so forth?

A Well, it is impossible to have an exact composition.

Q Now, let's go to — convert this down to a one-ounce bottle, which is our law. Now, that would contain — on the label it says how many milligrams of morphine?

A I believe it would say from 35 to 45 milligrams of morphine per one hundred cc's.

Q 35 to 45 per 100 cc's?

A Which is slightly over three ounces.

Q Now, that is what appears on the label, isn't it, of a bottle of paregoric?

A I am not sure. That is possible.

Q That this contains 35 to 45 — I forgot, milligrams, isn't it, mg?

A Mg.

Q Per 100 — 100 cc's is little over three ounces, right?

A Yes, sir. There would be no decimal point in front of the .35 or .45. It is a whole number.

Q Now, that is what appears on a bottle of paregoric, isn't that correct?

A I am not sure. I would have to look at a bottle.

Q Let's go and convert that down to a one-ounce bottle.

A Yes, sir.

(54) Q That would be approximately a third of that; is that right?

A Well, in the one instance, one fluid ounce, it would contain 10.35 milligrams to 13.31 milligrams per fluid ounce of anhydrous morphine per fluid ounce.

Q Now, let's go down to the one-ounce bottle and as far as grains are concerned, our statute mentions only grains, not milligrams. Now, let's reconvert this to grains. How many grains would it contain?

A In a fluid ounce it would contain from .160 to .205 grains per fluid ounce.

Q Now, in order that the Court might understand what is necessary here to get this from the label down to the actual content, how do you convert this, just briefly, how do you convert this 35 to 45 milligrams per one hundred cc's down to a one-ounce bottle?

MR. MATHEWS: Your Honor, can't the Court take judicial notice of the mathematics involved?

THE COURT: What?

MR. MATHEWS: Of the mathematics involved. I think we are just wasting a lot of time here going into all this mathematical conversions of these things.

THE COURT: No, I don't think so.

Q Just tell the Court how you convert that down.

A Well, you would take your 35 times 29.56 divided (55) by a hundred. There is 29.56 or 29.6 cc's in a fluid ounce.

Q Five times—

A 29.6 is close enough, and divide it by a hundred.

Q And that would give you the low level?

A That would give you the low level.

Q And you would take the 45—

A The same way.

Q The same way, and divide it by a hundred and that would give you the high level. Now, to reduce it from milligrams per ounce down to grains per ounce—

A Is that 15.31? It should be 13.31 in that figure there. What is the next question?

Q The next question is to reduce it from milligrams per ounce to grains per ounce.

A Well, there are between 64 and 65 milligrams in a grain, so you would divide your milligrams by 64, 64.8, I believe it is.

Q In other words, your 10.35 would be divided by 64.8 to get the low side, and you would get 13.31 divided by 64.8; this equals the high, and this equals the low, and

again this equals the high and this equals the low; is that right?

A I believe that is right.

MR. MATHEWS: Vice versa there.

THE WITNESS: Yes, the low is on the top.

Q Yes, the low is on the top. Now, all of that must (56) be done on a bottle of paregoric to see whether it comes within this section; is that right?

MR. MATHEWS: Objection. Mr. Riley has no way of knowing what would be done.

Q That is the way you get it down there, though, isn't it, Mr. Riley, from milligrams per one hundred cc's right down?

THE COURT: Objection overruled.

A That is the way I would do it.

Q So in each bottle of paregoric sold, according to U.S.P. standards, each ounce, there would be a range of .160 to .205 grains, right?

A .160.

Q .160. Now, let's reduce that to the section which says, "Contains not more than a quarter of a grain of morphine."

A Well, a quarter of a grain would be .25.

Q .25 would be a quarter. So if it was less, both of these are less than a quarter of a grain, right?

A Yes, sir, per fluid ounce.

Q Per fluid ounce of anhydrous morphine?

A Yes, sir.

Q What is the technical name of paregoric?

A Well, the pharmaceutical name most commonly used is camphorated tincture of opium.

Q Come.

A Camphorated—

(57) Q Tincture—

A Tincture of opium.

Q Of opium.

A Or opium tincture, camphorated.

Q And the trade name or common name is merely paregoric, right?

A Now, the common name is paregoric. That is not a trade name.

Q It is the common name?

A Yes, sir, the common. The name in common usage is paregoric.

Q And these two are the official names, right?

A Well, they are more technical names, which would be used by a pharmacist, which gives some indication of the composition.

THE COURT: Did you say paregoric is not a trade name, it is just a common name?

THE WITNESS: I would say it is a common name, the same as aspirin is the common name of salicylic acid. It is my understanding, or belief, that any pharmaceutical company could put up camphorated tincture of opium and label it paregoric. If it were a trade name, it would be a registered name, which is controlled by one particular company.

Q But they could label it something else, though, (58) couldn't they?

A Possibly they could. I don't know. Possibly they could register a name for it.

Q And there is no requirement, what I am getting at is, they have to stick to the name paregoric merely because of the common usage?

A Well, that is the official U. S. Pharmaceutical name for it.

Q Well, now, there is one other question I want to ask you.

THE COURT: What is the origin of the name paregoric? What does it mean?

THE WITNESS: I don't know the origin. The substance has changed in composition over a long period of time up to its present formula.

Q Did you prepare a conversion table from our original formula as to how to determine how much opium is left in a bottle of paregoric?

A Well—

Q I mean for one hundred cc's.

A Well, starting back with tincture of opium, the morphine content in tincture of opium is ten per cent of the opium, so the opium content in your paregoric would be ten times the morphine content.

Q So as to paregoric, or as to morphine—

(59) A That is the morphine there.

Q Now, as to opium, it would be ten times that, right?

A Yes.

Q Which would be 160—

A 1.60, I believe.

Q 1.60 to 2.05.

A Grains per fluid ounce. I believe that would be correct, or the closest figure you could obtain.

Q Now, when the paregoric on the high side, every bottle of it that contained 2.05, that was sold, would be greater than two grains, wouldn't it?

A Those are maximum and minimum figures.

Q But some of it does come out on the maximum side, doesn't it, some times?

A It could come out on the maximum side, since that is the maximum and minimum permissible quantity.

Q All right, now, if our statute reads, "Not more than two grains of opium," this is the statutory definition, two grains, each bottle of paregoric containing the maximum, or slightly under the maximum, would contain more opium than the statute allowed, right?

A Well, the 2.05 would be larger than two grains by a very small margin.

Q But it would be greater than two?

A Yes, sir.

(60) MR. SMITH: That is all.

• • •

Jack Braunstein,

Chief Drug Narcotic Inspector, State of Ohio
7705 Greenland Place, Cincinnati, Ohio

CROSS-EXAMINATION

By Mr. Smith: (Page 28)

Page 28:

Q. It is a trade name of Tincture of Opium, Camphorated, is it not?

A. Yes, sir.

Q. In other words, that is a manufacturer's name, paregoric?

A. Yes, sir.

Page 29:

Q. The true name is Tincture of Opium, Camphorated, isn't that correct?

A. Yes, sir.

Q. Now, Tincture of Opium, Camphorated contains a small amount of narcotic: is that correct?

A. Well, I am not a chemist.

• • •

Continuing on Page 29:

THE COURT: May I ask a question right here. All these seven exhibits that we went over, they all call for paregoric?

THE WITNESS: Yes, sir.

THE COURT: And immediately you made a record of that, because you were looking for violations of the statutory law?

THE WITNESS: The statutory law.

THE COURT: And you assumed that paregoric was a violation?

THE WITNESS: Yes, sir.

• • •

Page 31:

Q. Again you have the name, the date; is that right?

A. Right.

Q. The name of the individual?

A. Right.

Q. The address?

A. Right.

Q. By whom sold. That is the pharmacist or the person that sold it?

A. Right.

Q Is that paregoric?

A. Supposedly.

Q. Supposedly? What is it?

A. When I asked the pharmacist, he said, yes.

• • •

Page 44 RECROSS EXAMINATION

By Mr. Smith:

Q. I want to pin this down specifically, Mr. Braunstein. In your examination of that book, does it show anywhere that anyone of these items you have picked up contained more or less than two grains of opium?

MR. MATHEWS: Objection.

THE COURT: Objection sustained.

(45) MR. SMITH: Your Honor, this is the crux of the statute, the violation.

THE COURT: No. This is all named here as paregoric. The crux is, is paregoric a violation of the statute and comes within the—

MR. SMITH: That is what we have to prove or disprove, and to bring it in it must contain not less than two grains of opium, contain some opium, but not more than two grains, or contains some morphine, but not more than a quarter grain of morphine.

MR. MATHEWS: Your Honor, this man is just testifying as to what these records say.

THE COURT: Yes. He has already testified he took the druggists' word this is paregoric, at least on some of them. He had some kind of formula noted there, and he asked the druggist and the druggist said it was paregoric.

MR. SMITH: Well, there is no formula listed here on these records at all. It just says paregoric or cosanyl. Now, what I am trying to get at is, did you examine those books to find out if the druggist sold a preparation containing not more than one quarter grain of morphine or any of its salts?

MR. MATHEWS: The books, on the face of them, that is what they are.

MR. SMITH: It doesn't say that.

(46) MR. MATHEWS: The book is of exempt preparations. Now, Mr. Braunstein can only testify he asked the druggist, "Let me see your exempt preparation books," and the druggist handed him a book.

THE COURT: Objection sustained.

MR. MATHEWS: We will have to tie it up.

MR. SMITH: Our position is this is a highly technical situation. I want to bring out that these books do not show anywhere that what the individual is buying falls within the section, and my point is I want Mr. Braunstein to answer that these books do not show that these preparations that this is a preparation containing a quarter grain

of morphine; that they are using a trade name instead of the violation name. I think the public should know what they are buying when it comes under a statute like this, and the statute says, not paregoric, not more than one-quarter grain of morphine. So what I want him to testify to is that the books do not—

THE COURT: I will permit it.

Q Do you understand my question? These books do not set up that the preparation sold contains not more than one-quarter grain of morphine or any of its salts, does it?

A No, sir. I only check the records.

THE COURT: The books do not show the contents, except one ounce? It doesn't show the ingredients in what (47) was sold?

THE WITNESS: That is correct.

MR. SMITH: That is all.

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Samuel Dollin

Pharmacist, 1075 Sunnyslope Drive, Cincinnati, Ohio

CROSS-EXAMINATION

By Mr. Smith:

Page 65:

MR. SMITH: My position is, your Honor, for the individual to understand the statute with clarity, I think there should be evidence of how many of these things are listed by chemical formula insofar as the pharmacist would know. He is the one who is charged with the duty of knowing what is in these chemical compounds. He has a special knowledge that entitles him to know something more than you and I know. We didn't know what was in cosanyl. I didn't know what was in paregoric, and I

think there may be other products on the market. In fact, there are some 200 of them, I believe.

MR. MATHEWS: There you have answered his question now.

THE COURT: What has this got to do with the Defendant?

MR. SMITH: We are going to raise that as an issue in our defense, your Honor, and cite some authority to the Court on that.

THE COURT: Well, not the same detail here again that we went into before.

Page 66:

MR. SMITH: We won't go through that again.

THE COURT: All right.

Q. Approximately how many of these products are—

A. A great number, I wouldn't begin to hazard a guess, but there are a great number.

Q. Let me ask you this way. Would you say there are more than 200?

A. I would have no way of knowing. There are a good number, possibly a hundred or two hundred, I don't know.

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Samuel Berg,

Pharmacist. 7330 Parkdale Avenue, Cincinnati, Ohio

CROSS-EXAMINATION

By Mr. Smith:

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(87) Q What was that bottle labeled?

A It is labeled paregoric, later on one ounce, and also the contents of it, point — well, .35 to .45 — something, and anhydrous morphine.

Q The label says .35 to .45 grains, grams or grains, anhydrous (spelling) A-N-H-Y-D-R-O-U-S, anhydrous morphine?

A Right.

Q Now, that is what is on the label, right?

A Right.

Q And it sets up anise of alcohol, and so forth?

A Right.

Q No where on that label does it read not more than one-quarter grain of morphine, does it?

A No.

Q Now, I will ask you on the 18th—

THE COURT: To your knowledge, though, that is so, isn't that so, although it doesn't say so on the label?

THE WITNESS: That's right.

Q You mean by conversion tables you can get down to that figure; is that right?

(88) A Right.

Q Now, you can do those conversion tables, can you not?

A Well, not so good right now.

THE COURT: But as to your actual knowledge, you know when you see that formula the contents?

THE WITNESS: Yes.

Q You could convert it. You say you can't do it very well right now, but you could convert it from this down to the one-quarter grain, could you not?

A Yes, it is one-quarter.

Q Now, sir, that requires a bit of professional training to do that, doesn't it?

MR. MATHEWS: Objection.

THE COURT: Objection overruled.

Q Does it not?

A Yes, sure, somebody who knows.

Q Well, now, as a pharmacist, owning a pharmacy in the City of Cincinnati, licensed by the state, I will ask you if, in your opinion, an ordinary individual, having no special knowledge of milligrams, grains and cubic centimeters, could convert that?

MR. MATHEWS: Objection.

THE COURT: He says no.

THE WITNESS: No.

Q Now, this Fred Dunlap that you knew that came into (89) your store, did you, at any time, caution him or say to him on the 17th or 18th that the preparation that you are buying contains more than a quarter grain of morphine?

A No.

MR. SMITH: Thank you; that is all.

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Isadore Fleischman

Pharmacist, 5044 Oberlin Boulevard, Cincinnati, Ohio

CROSS-EXAMINATION

By Mr. Smith:

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Page 91:

Q. You bought the paregoric from a wholesaler, right?

A. From the manufacturer. I bought it direct from the manufacturer.

Q. On the paregoric that you sold, the label read .35 to .45 grains of anhydrous morphine per 100 cc's, right?

Page 92:

A. Yes, sir.

Q. It did not read this product contains more than one-quarter grain of morphine per fluid ounce, did it?

MR. MATHEWS: Objection.

THE COURT: Objection overruled.

A. It doesn't. I can't answer what that bottle contained. The bottles I have from the manufacturer now do not give that information, I mean from the manufacturer.

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Edward E. Tessel

Pharmacist, 7605 Castleton Place, Cincinnati, Ohio

CROSS-EXAMINATION

By Mr. Smith:

* * *

Page 96:

Q. It is also labeled .35 to .45 grains of anhydrous morphine per 100 cc's, right?

(97) A It could be.

Q It was, wasn't it?

A It could be a little different, too.

Q Well, you know it contained anhydrous morphine, didn't you?

A Yes, as far as we know of.

Q As far as you know of?

A As far as we know of, yes, according to our tax records.

Q The only way you would know it contained anhydrous morphine was on the label, right?

A Well, from appearances, yes.

Q So on the label, what other way would it be labeled other than .35 to .45 grains of anhydrous morphine per 100 cc's?

A Well it could be labeled as opium, too.

Q Then it would be labeled not more than 1.60 to 2.05 grains of opium, right?

A Right.

Q But it would be either one of those two?

A Right.

Q Now, there wasn't anything on that label at all to say that it contained not more than a quarter grain of morphine, though, was there?

A No, there wasn't.

Q Did you know it contained not more than a quarter (98) grain of morphine?

A Yes.

Q How did you know it?

A Well, according to our records, and according to our purchases and everything else under tax records, that is what we are paying for, and that is what we are buying. As far as chemically analyzing the thing, no.

Q No, I mean from the label. I know you didn't analyze it. We are not going into that. From the label itself, isn't it a fact the only reason you knew that it contained a quarter grain of morphine was that you could do the conversion table?

A Conversion from the metric system to the apothecary system, yes, sir.

Q And for an ordinary individual — an ordinary individual would have to come from the metric system to the apothecary system, right? And you were taught that in pharmacy school?

A Right.

Q They don't teach that in grade school, do they?

A No.

• • •

Henry T. Kail

Pharmacist, 3230 Observatory Avenue, Cincinnati, Ohio

CROSS-EXAMINATION

By Mr. Smith:

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Page 103:

Q. Did you ever tell Mr. Dunlap that was on the restricted list?

A. I tell all my customers I am permitted to sell one ounce of paregoric in one 24-hour period.

Page 104:

Q. I will ask you, did it have a symbol such as this (page 105) — on the bottle in red, an "X" at that time?

A. Well, it is quite a little bit back, but I believe that is what is had on the label. We buy it already packaged.

• • •

Page 105:

Q. How do you know you sold him paregoric?

A. The bottle was labeled paregoric.

• • •

Ben Torf

Pharmacist, 1838 Garden Lane, Cincinnati, Ohio

CROSS-EXAMINATION

By Mr. Smith:

• • •

Page 112:

Q. What else is on the label?

A. It contains 1.60 grain of morphine per ounce.

Q. There is a range in there, isn't there, 1.60 to 2.05?

A. Yes, I believe so.

Q Actually, what is on the label, though, is .35 to .45 grains of anhydrous morphine per one hundred cc's, isn't it?

A. Yes, per 100 cc.

Q. So that would be .35 to .45 anhydrous morphine per 100 cc's?

A. That is decimal 35, it is not 35.

Q. .35?

Page 113:

A. .35.

Q. That is what is on your label that you sell?

A. I think so. All I know, it is labeled paregoric.

• • •

Objection Made by Mr. Smith to the Court

Page 117:

MR. SMITH: Your Honor, for the purpose of the record, we are going to object to the introduction into evidence of these records called exempt narcotic records.

* * *

Page 119:

THE COURT: Yes, these are records made in the due course of business, and they all, except one I think, identified the man as having seen him. Therefore, we are admitting them all, with the modification of No. 9.

MR. MATHEWS: Right.

THE COURT: Yes.

(The items heretofore marked for identification state's Exhibit Nos. 1 through 12, inclusive, with a modification of Exhibit No. 9, were received in evidence.)

* * *

Henry Kail

Pharmacist, 3230 Observatory Avenue, Cincinnati, Ohio
Witness, in the James Barbour Case:

(5) CROSS-EXAMINATION

By Mr. Smith:

Q Mr. Kail, there are certain things we want to ask you about this section. You are a registered licensed pharmacist, right?

A That's right.

Q You went to medical college, is that right?

A College of Pharmacy.

Q College of Pharmacy. Now, prior to going to the College of Pharmacy did you know chemical formulas?

A No.

Q You were taught chemical formulas in the College of Pharmacy, right?

(6) A That's right.

Q This substance that you sell across the counter as paregoric, when Mr. Prem says U.S.P. standard what does that mean, tell the Court?

A It means that's what the U.S.P. requirements are for us.

Q U.S.P. means what?

A United States Pharmacopoeia.

Q That's a large book that sets forth what is contained in certain patent medicines, right?

A Not patent but prescription medicines.

Q Prescription medicines that are standardized, the formulas in there, you have access to that book, right?

A Yes.

Q No ordinary citizen has access to that book, right, as far as you know?

A That's right, as far as I know.

Q Now, that book sets up the formula for paregoric, right?

A Yes.

Q That book does not call paregoric paregoric though it calls it something different also, tincture of opium camphorate?

A Camphorated tincture of opium.

Q That's what we commonly call paregoric, right?

(7) A That's right.

Q Now, tincture of opium camphorated contains a morphine content, right?

A That's right.

Q Now, on the label of a bottle of tincture of opium camphorated you find these words, do you not, "Anhydrous Morphine"?

A Yes.

Q Now I will ask you if on a bottle of paregoric it is not on the label, it says ".035, .045 grams per 100 cc," right?

A Yes.

Q That's what paregoric is? That's what you find on the label?

A Some labels, yes.

Q Now our statute uses the word, instead of grams uses the word grains, not more than 2 grains, so we will put that word up there (writing on blackboard).

MR. PREM: I will object, Judge, the statute says not more than a half grain.

MR. SMITH: Well, not more than a half grain, we'll use the word grain.

I don't want to get involved. Withdraw that.

Q Grams is used on the label, grains is used in the statute: how do you get from grains to grams, or grams to grains, vice versa? You don't have to go through the whole formula.

A We know that .065 grams equals one grain, and you (8) can take it from there.

Q .065 grams equals one grain, right?

A That's right.

Q Now, this is the substance that you sold across the counter to James Barbour, right?

A Yes.

Q On the 12th day of March, was it?

A Yes.

Q 12th day of March, 1959?

A 1960.

Q 1960. Now, at the time that you sold this bottle of paregoric what size bottle was it?

A One ounce.

Q (Writing on blackboard) Now, prior to selling this product to James Barbour did you permit him to examine the label on the bottle?

A No.

Q In other words, when that sale was made across the counter he said, "One bottle of paregoric"; you put one bottle on the counter; he signed the book; paid for it; and left?

A That's right.

Q Now, there are other products in tincture of opium camphorated, other component parts?

A Other ingredients.

Q There's camphor?

(9) A Bensoic acid, glycerine, alcohol, water.

Q And anise oil?

A Yes, and the morphine content.

Q I will ask you, where did you learn to convert grains to grams?

A School.

Q Every-day school or specialized school?

MR. PREM: I will object.

THE COURT: He may answer the question.

A In the College of Pharmacy.

Q You didn't learn that in grade school or every-day high school or any place like that?

A No.

Q Per 100 cc's as it is written on this bottle, 100 cc is what, 100 cubic centimeters, is that right?

A Yes.

Q That's approximately how much in a language we understand?

A Well, 30 cc's is one ounce, so it is 3 and 1/3 ounces.

MR. SMITH: That's all.

MR. PREM: That's all.

(The witness left the stand.)

• • • •

(127) **Fred Dunlap**

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q Your name?

A Fred Dunlap.

Q Where do you live?

A 1026 Burton.

Q How long have you lived at 1026 Burton? Where did you live before that?

A 219 East Rochelle, and then before that I lived at 1871 Kinney.

THE COURT: You will have to talk a little louder.

A 1871 Kinney.

Q Now, Fred, where did you go to school?

A I went to Dyer and I went to Guilford.

Q Where is Guilford?

A Fourth and Ludlow.

Q Cincinnati?

A Cincinnati, Ohio.

Q How far did you go in school?

A To the ninth.

Q I will ask you whether or not you ever received any (128) special training in pharmaceutical calculations?

MR. MATHEWS: Objection.

A No, I didn't.

THE COURT: I will permit it.

Q Did you?

A No, I didn't.

Q Now, Fred, specifically, I want to know if you would be able to convert .35 to .45 milligrams per 100 cc's into grains per ounce?

MR. MATHEWS: Objection.

A No, sir.

THE COURT: Objection overruled.

MR. SMITH: What was the ruling of the Court?

THE COURT: I say, objection overruled.

Q You bought certain bottles of paregoric; is that right?

A Yes, sir.

Q You bought them from Cincinnati drug stores; is that right?

A Yes, sir.

THE COURT: You knew they were paregoric? You asked for paregoric?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Now, at the time that you purchased this paregoric, (129) did you have a conversation with the druggist?

A No.

MR. MATHEWS: I will object to that. It is all immaterial.

Q Did you talk to the druggist at the time you bought it?

A No.

Q Did he say anything to you?

A Only thing he said I could buy one bottle every 24 hours. He said I could buy one bottle here, and I couldn't buy but one there at a time in his store.

Q That is what the pharmacists told you?

A Yes, sir.

MR. MATHEWS: I will move that that be stricken, your Honor.

THE COURT: That may be stricken.

MR. SMITH: May it please the Court, this goes to a case that we will cite to the Court that shows the language—

THE COURT: All right, I will permit it. Go ahead.

Q Now, were you able, at the time –

THE COURT: May I ask you, does this case require that the person who sells it to inform the person who is asking for a certain brand of thing?

MR. SMITH: No, sir.

(130) THE COURT: Or its contents?

MR. MATHEWS: I think Mr. Smith is trying to prove ignorance of the law in this case, which my education taught me that was no excuse.

MR. SMITH: Well, I cite to you this case, your Honor. "The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of contact and know what it is his duty to avoid." This is Amer. Jur. United States v. Cohen Grocery. It is also United States v. Northern Pacific Railroad Company, 15 Ohio Jur. 2d, Page 251. And going further: "When an article or property is referred to in a penal statute as the subject of an offense, only such property as is usually designated by such terms can be supposed to be embraced within its provisions." And that cites Dembrow v. State, 18 Ohio State. It is again cited in 15 Ohio Jur. 2nd, Page 258.

MR. MATHEWS: Of course, this is the duty of the legislature to inform the citizen, not the druggist, your Honor.

MR. SMITH: Well, when the legislature couches something in a language only the pharmacist can understand, I submit the Defendant has a right to testify that it is (131) not within his knowledge so we can bring it within this case.

THE COURT: I have permitted you to.

MR. SMITH: Thank you. your Honor.

THE COURT: That he didn't know the contents, the chemical contents. I permitted that.

MR. SMITH: Yes, sir.

THE COURT: For the record.

MR. MATHEWS: To which I objected.

Q Now, I want to go to one other thing. Had you been in the habit of buying paregoric prior to the 17th and 18th?

A Yes, sir, I have.

Q Over what period of time?

A Over a period of maybe eight or nine months, or more.

Q Had you been going to the same drug stores?

A Yes, I had.

Q By that I mean had you been going around to Dusterberg, Dollin, Drucker, Berg, Broadway, Torf and Tessel?

A Yes, sir.

Q No other drug stores involved?

A I can't say right offhand, maybe so, one or two more.

Q How did you get in the habit of going to Dusterberg, Dollin's, Drucker's, Berg's, Broadway, Torf's and Tessel's?

MR. MATHEWS: I object to that, your Honor. It is (132) not material.

Q Why did you go to these particular drug stores?

A Well, all you do is walk in the drug store and ask for a bottle of paregoric, and the man gives you the book. Some drug stores you go in and ask for it; they say they don't sell it.

Q These fellows supplied it?

A On the day that I was arrested, I walked in the drug store and asked for a bottle of paregoric. No, I didn't even ask for a bottle of paregoric, I just come in the door

and the gentleman that was just on the stand here brought the register book for me to sign my name and address.

Q You mean you didn't even have to ask for it?

A No, sir.

Q He just stuck the register book up there?

A Yes, sir.

Q That was Mr. Kail?

A Yes, sir. One over there on Court and Vine, they just leave the book out and all you have to do is sign the book and they go and get the paregoric and bring it to you.

Q You don't have to ask for it?

A No, sir. And the man at Broadway got a book already out. At Berg's they have a book already out.

Q Fred, what did you pay for a bottle of paregoric?

A Some places $1.25; some places $0.88; some places (133) $0.62, $0.78, $0.52.

Q Did any of these druggists require you to buy anything else along with it?

A One drug store you had to buy a pack of cigarettes.

Q Where is that?

A That is at Drucker's. And at Mr. Berg's you had to buy something else besides paregoric, else you couldn't get the paregoric.

Q Now, the date you were arrested was when?

A I think it was in June or May. June, I think.

Q And that was about three months after March; is that right?

A Yes, sir.

Q Where were you arrested, in a drug store?

A Yes, sir.

Q Which drug store?

A At Dusterberg's. I had just walked in the door, and when I walked in the door, he put the register book up on there, and I signed my name, and when I turned

to go out the door, Mr. Witworth was coming in from the outside, and other man was already hid in the back of the store.

Q So you bought another bottle and drank it?

A Yes, sir.

Q Is that what you do with it, drink it?

A Yes, sir.

(134) Q Fred, I will ask you if, at the time of the 17th and 18th of March, when you purchased this paregoric, if you knew or had any knowledge that there was a limit to the amount of paregoric you could purchase?

MR. MATHEWS: Objection, your Honor. The law states what it is. He is charged with knowledge of the law.

A No.

THE COURT: I will permit him to answer.

A No, sir, because like when I went in the drug store, I put my name, my address and where I stayed. If I was going to try to do something against the law, I wouldn't do that. I wouldn't put my right name and address.

Q Each time you bought this paregoric, and let's take some of the times you went to Dusterberg —

THE COURT: I say I overruled that for the record: It may have some relationship to what you are trying to do.

Q On the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 11th, 12th, 13th, 14th, and so on, you signed your own right name right?

A My name and address.

Q You gave your right address?

A Yes, sir.

Q You didn't try to conceal what you were doing?

A No, sir, plus I had already — I had saw Mr. (135) Robisch. He came to my house before June, before they arrested me in June, for something to talk to me about something else, and he didn't say anything about it,

because I asked him then was it all right for me to use paregoric, and he said yes.

MR. MATHEWS: I am objecting to all this, your Honor. This is not material, and undoubtedly not correct.

THE COURT: Objection sustained.

MR. SMITH: Your Honor, I think it all goes to knowledge, the whole picture of what individuals know in the street.

THE COURT: It is too detailed. He said he didn't know. That is enough.

Q When you went to Dollin's, you used your right name, right?

A Yes, sir.

Q When you went to Drucker's, you used your right name?

A Yes, sir.

Q Berg's you used your right name?

A Yes, sir.

Q Broadway?

A Yes, sir.

Q Torf's, Tessel's?

A Yes, sir.

Q Sometime you bought cosanyl; is that right?

(136) A Yes, sir.

Q Sometimes paregoric?

A Yes, sir.

Q Now, I will ask you if you bought paregoric and/or cosanyl prior to October 22nd, 1959?

A Had I bought any before then?

Q Yes.

A Yes, sir.

MR. MATHEWS: I object to that. That is not material.

MR. SMITH: That is all. You may cross examine.

• • •

(37) **James M. Barbour**

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q Your name?

A James Matthew Barbour.

Q Where do you live?

A 3495 Burnet.

Q To clear the record up in the beginning on one thing, these signatures that were presented here they are your signatures, right, in these books?

A Yes, sir.

Q You bought the paregoric?

A Yes, sir.

Q Now, Jimmy, how much education do you have?

(38) A I finished high school.

Q Where did you go to high school?

A Springfield High School, Springfield, Ohio.

Q Did you study any chemistry?

A No, sir.

Q Jimmy, do you know how to convert 100 cc's, 100 cubic centimeters, to an ounce?

A No, sir.

MR. PREM: There will be an objection.

THE COURT: He answered no, sir. His answer may stand.

Q Jimmy, do you know what it means when it reads on a label .035 to .045 grams?

A No, sir.

Q Can you convert grams to grains?

A No, sir.

MR. PREM: There will be an objection.

THE COURT: Let's have some understanding on that. It's very obvious that counsel is going to continue to ask questions along this line. He states that is his defense. The Court is not ruling on the validity of it. The Court appreciates the State's position. That's the only defense you are going to pursue?

MR. SMITH: That's correct, your Honor.

THE COURT: I think in the ends of justice we will (39) let you go along that line and you might have a motion. However, the Court does not rule that it is so broad you can ask anything, but confine it within what you said in your opening statement.

MR. PREM: I am objecting on the grounds it is irrelevant and immaterial.

MR. SMITH: There is testimony that on a bottle of paregoric is contained certain words —

THE COURT: The Court has ruled. You may proceed.

MR. SMITH: Thanks.

THE COURT: However, the Court agrees to a great extent that it is a pretty broad question of its materiality.

Q Jimmy, when you bought all these bottles of paregoric they had a label on them, is that right?

A Yes.

Q Did you read that label?

A No, sir.

Q Was there any warning on there that you could only purchase one bottle within a 48 hour period?

A No, sir.

Q Were you ever told by anyone including a pharmacist or anybody else that you could only purchase one bottle in 48 hours?

A No, sir.

MR. PREM: I have to object to this because he is (40) asking for a hearsay answer and leading him.

THE COURT: Your objection is sustained to that question, counsel.

Q Jimmy, do you know the pharmaceutical name for paregoric?

A All I know is paregoric.

Q Do you know of your own knowledge how much opium or morphine is in paregoric?

A No, sir.

Q I am going to show you a formula on the board.

MR. SMITH: I would like for the reporter to copy this in the record, please.

(The following was copied from the formula that Mr. Smith referred to on the blackboard.)

Benzoic acid	14,020 grains
Gum Camphor	14,020 grains
Oil Anis	30 gallons
Opium	14,000 grains
Alcohol	29.2 gallons
Glycerine	300 ounces
Distiller water	27 gallons
	60 gallons

Q Jimmy, I want you to look at that formula I posted on the board, do you know what that is?

A No, sir.

MR. PREM: I object. I don't know what that is, Judge. That is not in evidence.

THE COURT: He says he doesn't know either.

(41) MR. PREM: And he's leading his witness with whatever he's trying to do now.

THE COURT: He answered he doesn't know.

Q Now, Jimmy, if I took this chemical formula of benzoic acid, 14,020 grains; gum camphor; oil anis; opium; alcohol; glycerine; distilled water; and told you that made

60 gallons, could you reduce mathematically the quantities in one ounce?

A No, sir.

MR. PREM: I am objecting because this is his witness, Judge. He's leading his witness and what he's trying to do is not properly laid. He hasn't got any chemistry expert testifying in here

MR. SMITH: I'm asking him if he could do it.

MR. PREM: I don't know if that's a formula myself.

MR. SMITH: I haven't said it is the formula to any particular thing. I asked him if he could convert that to one ounce.

THE COURT: Gentlemen, the witness says no. There's a great deal of leading, of course.

Q Do you know the chemical formula of paregoric?

A No, sir.

Q Jimmy, I'm going to ask you based upon your educational background, your experience, and your personal knowledge whether or not you know that paregoric contains not more than one-quarter grain of morphine or any of its salts.

(42) A From my knowledge I couldn't say what it contained, no, sir. I don't know what's in it.

Q I will ask you whether or not at the time you purchased paregoric from anyone of these five druggists whether or not you had any knowledge of the morphine content in that bottle.

A No, sir.

MR. PREM: Judge, he has asked that three times. I am objecting on the grounds of repetition.

THE COURT: He answered no.

MR. SMITH: Cross-examine.

* * *

APPENDIX "D"

Cincinnati Post & Times-Star, June 7, 1963

PRESCRIPTION SECRECY

Put Drug Names on Bottles, Doctors Told

By John Troan

Scripps-Howard Science Writer

WASHINGTON: Doctors were urged today to strip their prescriptions of age-old secrecy.

With rare exception, a University of Michigan physician said, every patient should know the name of every medicine he gets and how strong it is.

Dr. James L. Wilson said the need to keep prescriptions secret has virtually vanished because people know much more about medical problems than ever before and the use of fake medicine — called placebos — has declined.

DR. WILSON cited two advantages to listing the name and potency of every prescribed drug on the label of its container:

- If a child should swallow a drug, proper treatment could be speeded because the exact identity of the medicine would be known.
- If a patient should switch physicians, the new doctor could tell easily what medicines had been prescribed in the past and thus be better able to take over the case.

Dr. Wilson reported in the Journal of the American Medical Assn., that the University of Michigan Hospital started such a policy 10 years ago, and it has turned out to be "very satisfactory."

"Every year," he noted, "probably 100,000 or 200,000 children are poisoned by household medications badly enough to cause great concern, if not death."

YET OFTEN in such instances, he said, "the parents know only the color of the fluid or the color and shape of a pill" the child swallowed.

If a medicine is identified on the label by the druggist, Dr. Wilson said, a parent of a poisoned youngster can read the name right off the bottle over a telephone and be told immediately what emergency measures to take.

Or, he said, the container can be taken to a doctor's office or a hospital along with the child so the drug's identity can be established at once.

DR. WILSON said the chief objection to "candid identification of prescribed drugs" is that this "might entice a patient to attempt self-medication."

"In the experience of the University of Michigan," he said, "this risk has been negligible."

Besides, he said, "it can be corrected in part by limitations written on the prescription to prevent refilling."

Naming of Drugs
Gets Local Backing

Dr. Joseph Ghory, president-elect of the Cincinnati Academy of Medicine, said today the academy considers the suggestion to list the name and potency of prescription drugs on their containers as "a legitimate move in the right direction."

Some Cincinnati physicians already are requesting pharmacists to list such information on patients' prescriptions, he said.

APPENDIX "E"

In the

SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

FRED DUNLAP, and JAMES BARBOUR,

Defendant-Appellants.

No. 37689
No. 37690
(Consolidated for purposes of this Appeal.)

ASSIGNMENT OF ERRORS

1. The lower Court erred in overruling defendants' demurrer to the indictments and defendants' motions to dismiss at the close of the State's case and the close of all the evidence for the reason that the provisions of Paragraph two (2), Section 3719.16 Ohio Revised Code is unconstitutional and violates the provisions of Article 1, Sections 1, 16 and 19 of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States of America. Section 3719.16, Paragraph 2 is arbitrary, unreasonable and a discriminatory exercise of the police powers of the State and deprives the defendants of Due Process and Due Course of Law.

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In the

Supreme Court of the United States

October Term, 1963

FRED DUNLAP and JAMES BARBOUR,
Appellants,

v.

THE STATE OF OHIO,
Appellee.

On Appeal from the Supreme Court
of the State of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

RAYMOND E. SHANNON
Prosecuting Attorney
WILLIAM S. MATHEWS
Ass't. Prosecuting Attorney
CALVIN W. PREM
Ass't. Prosecuting Attorney
Attorneys for Appellee

MELVIN SCHAENGOLD
500-502 Keith Building
Cincinnati 2, Ohio
Attorney for Appellants

Court Index Press, Inc. — Law Printers — 800 Walnut St., Cincinnati 2, Ohio

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AUTHORITIES

Texts Cited:

Section 3719.16 R. C. 2, 3, 6, 9, 11, 12, 14, 15, 16, 17
Section 3719.09 R. C. 4, 6, 8, 9, 15
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Fourteenth Amendment to the Constitution of the United States 10-11, 13-14

Cases Cited:

Whipple v. Martinson, 256 U. S. 41 ..... 4, 7, 14
Robinson v. California, 370 U. S. 660 9
Jordan v. George, 341 U. S. 223 16

In the

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October Term, 1963

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FRED DUNLAP and JAMES BARBOUR,
Appellants,

v.

THE STATE OF OHIO,
Appellee.

On Appeal from the Supreme Court of the State of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

Now comes the State of Ohio, Appellee, by Raymond E. Shannon, Prosecuting Attorney of Hamilton County, Ohio, William S. Mathews and Calvin W. Prem, Assistant Prosecuting Attorneys of Hamilton County, Ohio, and respectfully move the Court for an order dismissing this appeal for the reason that there have been no denials of appellants' federal constitutional rights in the proceedings below.

JURISDICTIONAL STATEMENT

The appeal of appellants, Fred Dunlap and James Barbour, from the judgment of the Supreme Court of the State of Ohio, presents the question whether the appel-

lants' conviction of violating *Section 3719.16, Par. 2, of the Ohio Revised Code,* was consistent with the principles of due process, as is guaranteed in the Fourteenth Amendment to the Constitution, as well as the Eighth Amendment to the Constitution of the United States, which forbids cruel and unusual punishment.

OPINIONS BELOW

The brief of appellants clearly cites the opinions and judgments below.

THE STATUTE

The statute involved is Par. 2 of *Section 3719.16, Ohio Revised Code.*

QUESTIONS PRESENTED

The questions presented by the appellants on this appeal are:

1. Whether the *Section 3719.16, Par. 2, of the Ohio Revised Code,* is so vague and indefinite that it fails to provide notice to appellants that their conduct was unlawful; and

2. Whether the punishment provided by law for the violation of *Section 3719.16, Par. 2, Ohio Revised Code,* is cruel and unusual punishment.

I. STATEMENT OF THE CASE

The within cases are joined in a single brief since the fact situations and questions involved in both are identical.

The defendant-appellant, Fred Dunlap, hereinafter referred to as "Dunlap", waived his right to trial by jury, and trial was had in June, 1961. The defendant-appellant, James Barbour, hereinafter referred to as "Barbour", also

waived trial by jury, and was tried by the court in October, 1960. In both cases the court overruled defendants' demurrer to the indictment. Both defendants were found to be guilty as charged.

The judgment of the trial court was affirmed by the First District Court of Appeals of Ohio, without opinion.

The Supreme Court of Ohio dismissed the appeal to it for the reason that no debatable constitutional question was involved.

II. THE FACTS

On March 17 and 18, 1960, Dunlap, and on March 12 and 13, 1960, Barbour, entered numerous drug stores in the City of Cincinnati.

The record shows that Dunlap purchased nine one ounce bottles of paregoric in seven drug stores on March 17 and 18, 1960. Defendant, Barbour, purchased nine one ounce bottles of paregoric in five drug stores on March 12 and 13, 1960.

In all instances both defendants were required to sign their names, addresses and date of purchase in an "exempt narcotic register" kept, as required by law, by each of the pharmacists.

As a result of an investigation, examination and inspection of the various "exempt narcotics registers" the defendants, and fifteen other persons, were separately arrested and indicted for violation of *Section 3719.16 of the Ohio Revised Code.*

III. ARGUMENT

Appellants contend that the record demonstrates a denial to them of the constitutional guarantees of due process under the Fourteenth Amendment of the United States Constitution, in that the statute involved is vague and

indefinite; and that the constitutional guarantees of the Eighth Amendment of the United States Constitution have been denied them because, as applied here, a cruel and unusual punishment was inflicted on the appellants by virtue of the penal provisions of the statute.

THE STATUTE IS NEITHER VAGUE NOR INDEFINITE AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Appellants contend that the statute failed to provide them with notice of the illegality of their acts.

The broad power of the state to regulate the narcotics traffic within its borders has long since been decided by this court. Over forty years ago the Court:

> "explicitely recognized the validity of that power; 'there can be no question of the authority of the state, in the exercise of its police power, to regulate the administration, sale, prescription and use of the dangerous and habit forming drugs * * *.' The right to exercise this power is so manifestly in the interest of the public health and welfare that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question."
>
> *Whipple* v. *Martinson,* 256 U. S. 41 at page 45.

The Ohio Legislature has seen fit to prohibit possession of any narcotics, without prescription, by any person "except a manufacturer, wholesaler, practitioner, pharmacist, owner of a pharmacy, or other person authorized to administer or dispense narcotic drugs by the provisions of other sections of the Ohio Revised Code." *Section 3719.09 Ohio Revised Code.*

From the above it can be seen that we start off with the premise that no one, unless duly authorized, may, without prescription, possess narcotics in any shape or form. However, due to the small amount of narcotic content of certain medicinal preparations, the Legislature, under *Section 3719.15* of the Ohio Revised Code, has seen fit to make certain exceptions to this broad prohibition. These exceptions are set forth according to their chemical content, and not by trade name or otherwise.

A review of the Record of the trial (Transcript pages 16 to 18, Dunlap); (Transcript pages 4, 12, 18, 19, 24, 28, Barbour), discloses that the defendants purchased nine one ounce bottles of paregoric each from five separate drug stores on March 12 and 13, 1960, in the case of Barbour, and seven separate drug stores on March 17 and 18, 1960, in the case of Dunlap. And, upon cross-examination, the defendant, Barbour, admitted these purchases, (Transcript pages 47-50), and admitted that he had, in fact, purchased over a hundred bottles of paregoric in the month of March, 1960, (Transcript page 42), which he drank, (Transcript page 43). The testimony was had (Barbour Transcript page 3) from one of the druggists that "paregoric" contains approximately 1/4 of a grain of morphine to each ounce of the liquid preparation; and that it (paregoric) is manufactured in accordance with U. S. P. (United States Pharmacopoeia) standards. A stipulation was made by counsel for the defendants and counsel for the plaintiff (Barbour Transcript page 51) that the preparation known as "paregoric" contains benzoic acid, camphor, oil of anise, opium, alcohol, glycerine and distilled water; that all paregoric is manufactured under U. S. P. (United States Pharmacopoeia) standards; and that the finished product contains between .035 and .045 milligrams of morphine per fluid ounce.

Section 3719.16 Ohio Revised Code, Par. 2, under which the defendant-appellants were indicted, reads as follows:

> "No person shall obtain or attempt to obtain, under the exemptions of section 3719.15 of the Revised Code, more than one preparation exempted by the provisions of that section within forty-eight consecutive hours."

Section 3719.15, Ohio Revised Code, which is sometimes referred to as the "exemption" section, in so far as it is applicable to the instant case, reads as follows:

> "Except as specifically provided in sections 3719.01 to 3719.22, inclusive, of the Revised Code such sections shall not apply to the following cases:
>
> (A) * * * where a pharmacist or owner of a pharmacy sells at retail any medicinal preparation that contains in one fluid ounce * * *
>
> (2) Not more than one quarter of a grain of morphine or of any of its salts;"

Section 3719.09, Ohio Revised Code, provides as follows:

> "No person except a manufacturer, wholesaler, practitioner, pharmacist, owner of a pharmacy, or other person authorized to administer or dispense narcotic drugs by the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code shall have in his possession or under his control any narcotic drug or narcotic drug preparation unless such drug is exempted under the provisions of section 3719.15 of the Revised Code, *and the quantity of such drug does not exceed two grains of opium, or one-half of a grain of morphine or any of its salts, or four grains of codeine or any of its salts, or two grains of dihydrocodeine or any of its salts, or one-half grain of ethylmorphine or any of its salts, or a quantity of any other narcotic drug or any combination of narcotic drugs that exceeds in*

pharmacologic potency any one of the drugs named above in the quantity stated, or unless such drug was obtained pursuant to a prescription issued by a practitioner and is in the original container in which it was dispensed to such person. Possession by a person not excepted by the provisions of this section of a narcotic drug not exempted by the provisions of this section is presumptive evidence of intent to violate the provisions of this section. (Emphasis added)

Therefore the Legislature has, by statute, enacted legislation which controls the narcotic traffic in the State of Ohio by providing that, without a prescription issued by a doctor, no person shall have any narcotic drug or narcotic drug preparation (excepting those preparations which are "exempted" by *Section 3719.15, Revised Code*) in his possession. *Whipple* v. *Martinson, Supra.* Certain narcotic drug preparations are "exempted" because of their actual narcotic content, per fluid ounce of preparation, is small. "Paregoric", which is a narcotic drug preparation manufactured under U. S. P. standards is one of the preparations which is considered an "exempted preparation" because it contains slightly less than one quarter of a grain of morphine in every fluid ounce of the finished product.

In ordinary usage, a one fluid ounce purchase of paregoric does not create or present any narcotic drug danger to the person having such narcotic drug preparation in his possession or under his control. The medicinal value of the preparation, in that quantity, outweighs the narcotic drug danger existing in so small a narcotic drug content. However, as the fluid quantity increases so does the total quantity of narcotic drug. Therefore, if we assume that paregoric contains exactly one quarter grain of morphine in every one fluid ounce of preparation, then two one ounce bottles of paregoric would contain one-half grain

of morphine, and four one ounce bottles of paregoric would contain a full grain of morphine. In the case at bar, defendant-appellant purchased nine one ounce preparations of paregoric from five different drug stores, in a two day period of time. Those nine one ounce preparations provided him with approximately two full grains of morphine. And, the defendant-appellant's admission that he actually purchased over one hundred one ounce bottles of paregoric during the entire month in question, represents his having obtained, and used, twenty-five full grains of morphine.

It should be further noted that both defendants, upon cross-examination in the trial of the within cause, admitted that they were narcotic addicts, and had been for some period of time.

It is respectfully represented that the Legislature, in regulating the narcotic traffic in this State, intended that narcotic drugs and narcotic drug preparations be obtained only by a doctor's prescription (*Section 3719.09 R. C.*) It recognized a medicinal value of certain drug preparations having a very small actual narcotic drug content in relation to the whole preparation and, therefore, exempted them from the prescription requirements of *Section 3719.-09, Revised Code of Ohio* (*Section 3719.15, R. C.*) By enacting this section (3719.15, R. C.) of the Code, the Legislature granted a privilege to dispense, or obtain, certain drug preparations having a small narcotic drug content without the prerequisite of having a doctor's prescription.

Having granted that privilege, however, the Legislature was concerned about the abuses in the handling of those "exempted preparations". It was mindful of the danger of any one person's ability to accumulate a quantity of narcotic drugs by making multiple purchases of otherwise exempted medicinal drug preparations. Therefore, the

Legislature enacted *Section 3719.16, Revised Code.* The second paragraph of that section prohibits any person from obtaining more than "one exempted preparation" within forty-eight hours.

In the case of *Robinson* v. *California,* 370 U. S. 660, this Court held:

> "In short, the range of valid choice which a state might make in this area (narcotics regulation) is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide.

Section 3719.09, Revised Code, has already provided that no one shall possess more than one-half grain of morphine or any of its salts (without a prescription). Paregoric is an "exempted preparation" because it does not contain more than one quarter of a grain in any preparation of one fluid ounce. Multiple purchases of one ounce preparations of Paregoric would result in an accumulation of morphine exceeding one-half of a grain. The Legislature, therefore, has limited the privilege of purchasing exempted narcotic drug preparations to not more than one such preparation in any forty-eight hour period.

From the facts in the cases at bar, there is no question that the defendants violated *Section 3719.16, of the Revised Code,* by making nine purchases of paregoric and obtaining nine ounces of same. A verdict of "guilty as charged" was returned accordingly.

The appeal to the First District Court of Appeals, and to this Court, has been taken on the claim that *Sections 3719.15 and 3719.16, of the Revised Code of Ohio,* are unconstitutional because they conflict with one another, and also that *Section 3719.16, Par. 2, of the Revised Code of Ohio,* is unconstitutional because it violates the provisions of *Article I, Sections 1, 16, and 19 of the Constitution of*

Ohio, and also the *Fourteenth Amendment to the Constitution of the United States.*

Article I, Section 1, of the Constitution of Ohio, is as follows:

> "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Article I, Section 16, of the Constitution of Ohio, is as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Article I, Section 19, of the Constitution of Ohio, is as follows:

> "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner."

The *Fourteenth Amendment to the Constitution of the United States* is as follows:

> "All persons born or naturalized in the United States,

> and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

From a reading of the above indicated Sections of the Ohio Constitution, and the Fourteenth Amendment to the United States Constitution, it is difficult to believe that counsel for the defendants is serious in his position and claim that "the provisions of Paragraph two (2), Section 3819.16, Ohio Revised Code, is unconstitutional and violates the provisions of Article I, Sections 1, 16 and 19 of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States of America." It is claimed that "Section 3719.16, Paragraph 2 is arbitrary, unreasonable and a discriminatory exercise of the police powers of the State and deprives the defendants of Due Process and Due Course or Law." (Defendants' brief, Assignment of Error.)

Although the various sections of *Article I of the Ohio Constitution*, and the *Fourteenth Amendment of the Constitution of the United States*, are mentioned in the sole Assignment of Error set forth in the defendants' brief, the argument following, and in support of, the Assignment of Error, appears to be confined to the claim that the Revised Code Section involved in this case is an arbitrary, unreasonable and a discriminatory exercise of the police powers of the State.

First of all, counsel for the defendants has submitted that *Section 3719.16, of the Revised Code of Ohio*, is directed to a "class of people". That such contention is

completely erroneous requires only a reading of the language used in that section, i. e., "No person shall dispense or sell . . ." (in paragraph 1) and "No person shall obtain or attempt to obtain . . ." (in paragraph 2). Certainly, by no stretch of the even most over-active imagination can a reading of that language lead one to conclude that that legislation is directed to a "class" of people.

"No person", as used in *Section 3719.16, Revised Code*, means exactly what it says and applies to all persons of every race, color and creed, regardless of sex, marital status, financial status or educational achievement. Insofar as the case at bar is here concerned, the legislature, under the police powers of the State of Ohio, has prohibited everyone from obtaining, or attempting to obtain, within forty-eight hours, more than one preparation exempted under Section 3719.15, Revised Code.

It has been suggested that, to understand and interpret *Section 3719.16, Revised Code*, one must first be educated in chemistry and skilled in the numerical transpositions necessary to convert grams to grains, and vice vera. It is respectfully submitted that such claim is also not correct.

Counsel for the defendants, in an earlier brief filed in this case (in both the trial court and the Appellate Court) cited what he felt was a companionable example to this "educational" argument. The example he used in those briefs occurred when he wrote the following question pertaining to the liquor laws of this State:

> "What confusion would arise if suddenly the legislature, without warning, enacted legislation saying one could not purchase more than one preparation containing more than 100 cc of C_2H_2OH?"

Counsel then asked, "How can a citizen, with ordinary intelligence, know what it means?"

Such legislation (the liquor laws of the State of Ohio) creates a duty; a restriction, upon the consumer to know what he is obtaining, and how much he is getting. In actual practice, under the liquor laws, tavern owners are licensed and permitted to sell and dispense beer, wine and whiskey to the public, but they are regulated in what they sell, and how much, and to whom and when. And consumers are permitted to purchase the various intoxicating beverages, but the purchases are regulated in what is bought, who does the buying and when.

The example, as applies to the case at bar, would be seen in connection with the provision that only beer having a 3.2% alcoholic content can be purchased (or sold) on Sundays and certain other days of the year. A citizen, who makes himself a patron of any liquor dispensing establishment, on Sundays, does not have to be chemically and/or mathematically trained in order to know the law and comply with it.

Those laws, both the liquor laws and the narcotic laws, of this State, are designed to limit, regulate and control substances which could otherwise be extremely dangerous to the public. As such, those regulations are not unconstitutional. And, ignorance of the amount of chemical, or narcotic content, or whether a purchaser can understand chemical symbols, or whether he has any educational ability at all, is immaterial.

It would seem that, if the argument of counsel for the defendants, that his clients lack specialized chemical training, was with merit, then all illiterate persons should be totally immune from prosecution and punishment for any crime because they are unable to read and understand the statutes.

It is respectfully submitted that nowhere in the *Constitution of the State of Ohio*, or the *Constitution of the*

United States, can there be found any property right guarantee to purchase, obtain, possess and/or use narcotic drugs. On the other hand, the legislature has established the narcotic laws of this State with a view toward protecting the health, welfare and safety of society. As such, the statute here involved has a very real and substantial relation to that purpose.

The police power is one of the least limitable powers of government and includes anything which is reasonable, necessary and appropriate to secure the peace, order, protection, good health, comfort, quiet morals, welfare, prosperity and best interests of the public. It has been said that it may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

There can be no question that narcotics, and the illicit traffic in narcotics, presents a field which constitutes a tremendous hazard to the peace, protection, good health, morals, welfare and best interests of the public. For that reason, laws governing, regulating and controlling all phases of the narcotics problem have been enacted by both the Federal and State Governments. It has been reported that the Ohio Legislation on this subject has resulted in a model law which has been, and is being, copied by other state legislatures in their efforts to curb and control narcotics traffic and other attendant crimes. Such legislation, enacted for the protection of the public, is entirely proper under the police powers of the State. *Whipple* v. *Martinson*, *supra*.

As has been previously stated herein, the legislature, under the police powers of this State, enacted the "narcotic laws" of which *Section 3719.16, Revised Code*, the complained of section, is a part. The purpose for those

laws, and the intention of the lawmaking body in passing them, is clear. The subject of the crime charged in the instant case is not a "chemical formula" (as counsel for defendants has suggested), but is "narcotic preparation".

From a reading of *Sections 3719.09, 3719.15 and 3719.16, Revised Code*, it is quite apparent that, under Ohio law, without a prescription, no person shall have any narcotic drug, or narcotic drug preparation, in his possession or under his control *unless* it is one of the exempted narcotic preparations and providing that the quantity possessed does not exceed two grains of opium, or one-half grain of morphine or any of its salts. There is no confusion or conflict in the ordinary reading and the ordinary meaning of the words used. It is plain that the legislature intended to regulate narcotics by requiring prescriptions for all narcotic drugs excepting those medicinal preparations which contain only a small amount of narcotic drug and are, therefore, in normal use, considered not to be dangerous. And, realizing the danger of a person's unrestricted ability to purchase those "exempted narcotic drug preparations" and thereby accumulate a quantity of narcotic drugs, the legislature limited and restricted the sale and purchase of those otherwise exempted preparations so that no one person can obtain more of the actual narcotic drug than two grains of opium or one-half grain of morphine or any of its salts.

Section 3719.16, Revised Code, states simply that no person shall obtain, or attempt to obtain, more than one exempted preparation (without a prescription) within any forty-eight hour period. There is absolutely nothing in the wording of that section of the Code which is ambiguous, contradictory, confusing or requiring of constructive interpretation. There being no ambiguity and nothing left to conjecture, there is no need for interpre-

tation. The legislature intended to regulate narcotic drugs by requiring prescriptions, but exempted certain medicinal preparations containing only a small amount of narcotic drugs. That exemption section of the Code was qualified by the use of the words "Except as specifically provided" so as not to conflict with the entire narcotic act. *Section 3719.16, Revised Code,* specifically provides that only one exempted preparation can be lawfully purchased in any forty-eight hour period. Clearly, it is a limitation designed to guard against abuse of the freedom to purchase some substances which contain narcotic drugs where the control over narcotic traffic is rigidly and strictly enforced.

A penal statute which describes the offense with reasonable certainty is not void for uncertainty.

> "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan* v. *George,* 341 U. S. 223.
>
> "Difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness, and the impossible standards of specificity are not required, and the test is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *Jordan* v. *George, supra.*

SUMMARY AND CONCLUSION

There is no conflict in the language of *Sections 3719.15 and 3719.16, Revised Code,* compared to one another, nor in comparing them with the language of any of the other sections of the Narcotic Act. And, there is no conflict between the wording of paragraphs one and two

within *Section 3719.16, Revised Code,* itself. Paragraph one pertains to the selling or dispensing of exempted narcotic drug preparations, and paragraph two pertains to the obtaining of such preparations.

There is, likewise, no ambiguity or vagueness in the language used. The language used by the legislature in *Section 3719.16, Revised Code,* is plain and conveys a clear and definite meaning and does not require any conjecture or interpretation.

Ignorance of the law cannot be used as an excuse to commit crime, nor does amenability to the criminal laws of this State require a particular kind or degree of education.

The section here complained of is written in ordinary language, and the words, given their ordinary meaning, define the act or acts prohibited. The fact that the defendants-appellants do not have a chemical or mathematical education, or the fact that the name paregoric is not set forth in any of the narcotic sections of the Code, does not support a claim of a violation of the defendants'-appellants' civil rights or deprive them of due process.

Section 3719.16, Revised Code of Ohio, does not violate the provisions of *Article I, Sections 1, 16 and 19 of the Constitution of Ohio,* and does not violate the *Fourteenth Amendment to the Constitution of the United States of America.*

Paragraph 2 of said Section 3719.16 of the Ohio Revised Code is neither vague nor indefinite, and does not violate the due process clause of the Fourteenth Amendment, and is not an abusive nor discriminatory exercise of the police powers of the state.

It is further respectfully submitted that, as applied here, the penal provisions of said Section are not cruel and unusual.

For these reasons appellee respectfully submits that the Motion to Dismiss this Appeal should be allowed, and the appeal dismissed.

Respectfully submitted,

RAYMOND E. SHANNON
Prosecuting Attorney

WILLIAM S. MATHEWS
Ass't. Prosecuting Attorney

CALVIN W. PREM
Ass't. Prosecuting Attorney
Attorneys for Appellee

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No. 288

In The

Supreme Court of the United States

Appellate Docket

October Term, 1963

FRED DUNLAP and JAMES BARBOUR,
Appellants,

vs.

THE STATE OF OHIO,
Appellee.

BRIEF OF APPELLANTS OPPOSING APPELLEE'S MOTION TO DISMISS APPEAL

MELVIN SCHAENGOLD
500-502 Keith Building
Cincinnati 2, Ohio
Attorney for Appellants

Of Counsel:
EUGENE D. SMITH, Esq.
Attorney at Law
18 East Fourth Street
Cincinnati 2, Ohio

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BRIEF OF APPELLANTS OPPOSING APPELLEE'S MOTION TO DISMISS APPEAL

Appellee's motion to dismiss is predicated primarily on the grounds best stated by Appellee, on Page 13 of their brief, in which Appellee states "that nowhere in the Constitution of the State of Ohio or the Constitution of the United States, can there be found any property right guarantee to purchase, obtain, possess and/or use narcotic drugs." In so stating, Appellee has side-stepped the main issue of this Appeal which restated is as follows: Whether or not Section 3719.16 of the Ohio Revised Code, which falls under the Ohio Narcotic Control Act, is stated in language that only trained persons can understand, and thereby become void for vagueness as to ordinary persons without special training.

A common example of technical vagueness may be simply illustrated by the following example: A father sees a beautifully-assembled bicycle on display in a savings stamp redemption store window. After saving sufficient stamps and ordering same, he finds much to his dismay, it is delivered in a box containing multiple screws, nuts, handlebars, and all sorts of pieces that are supposed to fit together to make a bicycle. Inside the box, also, he finds a very concise, technical brochure detailing the steps to assemble the bicycle. There is no question that a person with mechanical training can and does understand the technical language of the brochure. However, the ordinary citizen without such training has to consult a neighbor, a bicycle repair shop or other persons generally to assemble his son's bicycle. *Simply, concise, technical language becomes vague by reason of lack of understanding or technical training.*

Appellants contend that it is cruel and inhuman to impose a penalty on a citizen who violates a law such citizen cannot, by reason of ordinary training, understand. Such prohibition may as well be written in Latin. It therefore becomes obvious that a constitutional question is raised under the 14th Amendment in this case. Liberty is a property right and must be zealously guarded.

Prohibitions under Police Power must be scrutinized for clarity where punishment is involved. Section 3719.16 of the Ohio Revised Code does violate the provisions of the 14th Amendment to the Constitution of the United States. While a state may regulate the manner in which narcotics are used (*Whipple* v. *Martinson*, 256 US 41) the state can not destroy the right to use them. *Robinson* v. *California*, 370 US 660.

Appellee, in their brief, contends that the state has the power to destroy the right to use them and avoids the issue of method of regulation.

The Court's attention is hereby called to the case of *Arceneaux* v. *Louisiana*, No. 76, Appellate Docket (in forma pauperis) involving the same issue of void for vagueness. Appellants respectfully adopt the contentions of the brief on the merits of the Appellant-Arceneaux in support of their contention that the statute under which they were convicted is likewise void for vagueness.

For the foregoing reasons, the Appellants ask this Honorable Court to overrule the Motion to Dismiss the Appeal, and to note Probable Jurisdiction.

All of which is repectfully submitted by,

MELVIN SCHAENGOLD
500-502 Keith Building
Cincinnati 2, Ohio
Attorney for Appellants.

Of Counsel:
EUGENE D. SMITH, Esq.
Attorney at Law
18 East Fourth Street
Cincinnati 2, Ohio